Supreme Court, U.S.
FILED
(1)
96 52 JUL 9 1996
OFFICE OF THE CLERK

No. 95

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RAYMOND REECE,

Petitioner,

v.

HOUSTON LIGHTING & POWER COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PAUL ALAN LEVY
(Counsel of Record)
ALAN B. MORRISON

Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

MICHAEL SCOTT THOMAS

Suite 180
2646 South Loop West
Houston, Texas 77054
(713) 665-8558

Attorneys for Petitioner

July 9, 1996

56 pp

QUESTION PRESENTED

Are an employee's claims of racial discrimination under state statutes and common law completely preempted by section 301 of the Labor Management Relations Act, and thereby automatically subject to removal to federal court, whenever the employer asserts that its conduct was permitted by an applicable collective bargaining agreement?

All parties to the proceeding below are listed in the caption.

TABLE OF CONTENTS

Question Presented i

Table of Authorities iv

Jurisdiction 2

Statutes Involved 2

STATEMENT 2

A. Facts 2

B. Proceedings Below 4

REASONS FOR GRANTING THE WRIT 8

THE DECISION BELOW CONFLICTS WITH SEVERAL DECISIONS OF THIS COURT AND OTHER STATE AND FEDERAL COURTS, AND PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW ABOUT WHETHER EMPLOYMENT DISCRIMINATION COMPLAINTS UNDER STATE LAW ARE AUTOMATICALLY PREEMPTED, AND HENCE REMOVABLE, WHEN THE EMPLOYER DEFENDS ON THE GROUND THAT IT COMPLIED WITH A COLLECTIVE BARGAINING AGREEMENT. 8

Conclusion 24

TABLE OF AUTHORITIES

Cases: **Page**

Allis-Chalmers Corp. v. Lueck,
471 U.S. 202 (1985) 9, 12, 16, 19

Avco Corp. v. Machinists,
390 U.S. 557 (1968) 7

Carrington v. RCA Global Communications,
762 F. Supp. 632 (D.N.J. 1991) 14

Caterpillar v. Williams,
482 U.S. 386 (1987) 20, 21, 22, 23

Commodore v. University Mech. Contr.,
120 Wash. 2d 120, 839 P.2d 314 (1992) . . . 15, 18

Conrail v. RLEA,
491 U.S. 299 (1989) 11

Cook v. Lindsay Olive Growers,
911 F.2d 233 (9th Cir. 1990) 14

Davis v. Johnson Controls,
21 F.3d 866 (8th Cir. 1994) 13

Galvez v. Kuhn,
933 F.2d 773 (9th Cir. 1991) 18, 20

Glass Molders v. Wickes Cos.,
707 F.Supp. 174 (D.N.J. 1989) 23

Hanks v. General Motors,
906 F.2d 341 (8th Cir. 1990) 17

Hatridge v. Day & Zimmerman,
789 S.W.2d 654
(Tex. App.- Texarkana 1990) 14

Hawaiian Airlines v. Norris,
114 S. Ct. 2239 (1994) . . . . . *passim*

Hirras v. National RR Passenger Corp.,
48 F.3d 278, 283-284 (5th Cir. 1995) 18

Humphrey v. Sequentia,
58 F.3d 1238 (8th Cir. 1995) 23

IBEW v. Hechler,
481 U.S. 851 (1987) 9

Jackson v. Kimel,
992 F.2d 1318 (4th Cir. 1993) 18

Jackson v. Southern California Gas Co.,
881 F.2d 638 (9th Cir. 1989) 17, 18

Jimeno v. Mobil Oil Corp.,
66 F.3d 1514 (9th Cir. 1995) 13

Johnson v. Beatrice Foods Co.,
921 F.2d 1015 (10th Cir. 1990) 17

Keehr v. Consolidated Freightways,
825 F.2d 133 (7th Cir. 1987) 17

Knox v. Wheeling-Pittsburgh Steel Corp.,
899 F. Supp. 1529 (N.D.W.Va. 1995) 15

Kohl's Food Stores v. Hyland,
32 F.3d 1075 (7th Cir. 1994) 14

Lightning v. Roadway Express,
60 F.3d 1551 (11th Cir. 1995) 17

Lingle v. Norge,
486 U.S. 399 (1988) . . . . . *passim*

Lingle v. Norge,
823 F.2d 1031 (7th Cir. 1987),
rev'd, 486 U.S. 399 (1988) 15

Livadas v. Bradshaw,
114 S. Ct. 2068 (1994) 11, 12, 16, 19

Machinists Local 967 v. General Elec. Co.,
713 F. Supp. 547 (N.D.N.Y. 1989) 23

Martin Marietta Corp. v. Maryland Comm. on Human Relations,
38 F.3d 1392 (4th Cir. 1994) 13

McCall v. Chesapeake & Ohio Ry. Co.,
844 F.2d 294 (6th Cir. 1988) 13, 15

McCormick v. AT&T Technologies,
934 F.2d 531 (4th Cir. 1993) 16

Medrano v. Excel Corp.,
985 F.2d 230 (5th Cir. 1993) 5, 7, 12

Medtronic, Inc. v. Lohr,
No. 95-754 (June 26, 1996) 16, 17

Miller v. AT&T Network Systems,
850 F.2d 543 (9th Cir. 1988) 13, 18

Miller v. Fairchild Industries,
668 F. Supp. 461 (D. Md. 1987) 23

Milne Employee's Ass'n v. Sun Carriers,
960 F.2d 1401 (9th Cir. 1991) 17

Mock v. T.G.&Y. Stores,
971 F.2d 522 (10th Cir. 1992) 17

Nash v. AT&T Nassau Metals,
381 S.E.2d 206 (S.C. 1989) 19

O'Brien v. Conrail,
972 F.2d 1 (1st Cir. 1992) 13, 15

Oklahoma Tax Commission v. Graham,
489 U.S. 838 (1989) 20, 21, 22, 23

Pikop v. Burlington Northern R. Co.,
390 N.W.2d 743 (Minn. 1986) 18

Plumbers Local 57 v. Bechtel Power Corp.,
834 F.2d 884 (10th Cir. 1987) 21

Quesnel v. Prudential Ins. Co.,
66 F.3d 8 (1st Cir. 1995) 13

Ramirez v. Fox Television Station,
998 F.2d 743 (9th Cir. 1993) 7, 13, 14

Rasheed v. International Paper Co.,
826 F. Supp. 1377 (S.D. Ala. 1993) 17

Smolarek v. Chrysler Corp.,
879 F.2d 1326 (6th Cir. 1989) 13, 23

Stikes v. Chevron USA,
914 F.2d 1265 (9th Cir. 1990) 23

Taggart v. TWA,
40 F.3d 269 (8th Cir. 1994) 13

Teamsters Local 174 v. Lucas Flour Co.,
369 U.S. 95 (1962) 9

Tisdale v. Plumbers Local 704,
25 F.3d 1308 (6th Cir. 1994) 23

Welch v. General Motors Corp.,
922 F.2d 287 (6th Cir. 1990) 23

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1447(c) 15

Civil Rights Act of 1964,
Title VII 4

Labor Management Relations Act,
29 U.S.C. §§ 151 *et seq.*

Section 301, 29 U.S.C. § 185 . . . . . *passim*

Railway Labor Act,
45 U.S.C. §§ 151 *et seq.* 9, 11

Texas Labor Code,
Section 21.001 4
Section 21.051 2

No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RAYMOND REECE,

Petitioner,

v.

HOUSTON LIGHTING & POWER COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Raymond Reece petitions the Court to grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review that court's judgment in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 79 F.3d 485, and appears in the Appendix to this Petition at 1a-5a (App. 1a-5a). The district court's memoranda and orders denying petitioner's motion to remand this case to the state court from which it had been removed, and then denying a motion for reconsideration of that order, are printed at App. 6a and 7a-10a. The district court's order granting summary judgment to respondent appears at App. 12a-18a. The district court's memoranda and orders are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1996. App. 1a-5a. This Court has jurisdiction to review that judgment under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy or without regard to the citizenship of the parties.

Section 21.051 of the Texas Labor Code provides as follows, in pertinent part:

> [A]n employer commits an unlawful employment practice if because of race . . . the employer (1) discriminates in any other manner against an individual in connection with compensation or the terms, conditions or privileges of employment or (2) limits . . . an employee or applicant for employment in a manner that would deprive or tend to deprive an individual of any employment opportunity.

STATEMENT

A. Facts.

Petitioner Raymond Reece, who is black, has been an electrician for respondent Houston Lighting and Power Company since 1974; he currently holds the position of head

cable splicer. Several times he sought promotions to the position of crew leader and access to company classes that other head cable splicers were taking in order to enhance their skills and improve their chances for promotion. He was denied such opportunities, and noticed that respondent consistently gave them to white employees with less seniority than he. For example, during 1994 and 1995, 19 white employees in respondent's underground cable department received fiber optic training; no black employees received such training. At the same time, eighteen white employees, but no black employees, took classes on troubleshooting. And eight white, and no black, employees hold positions as crew leaders.

Respondent's production and maintenance employees are represented in collective bargaining by Local 66 of the International Brotherhood of Electrical Workers, and work under a collective bargaining agreement ("CBA") between Local 66 and respondent. Under the CBA, promotions for most employees are governed by seniority, so long as ability, skill and qualifications are equal. However, selection, promotion and assignment of head journeymen (of which head cable splicers such as petitioner are one kind), are within respondent's "sole discretion"; the CBA allows respondent to consider not only ability, skill, qualifications, performance, seniority, attendance and conduct, but any other matter. Similarly, the CBA reserves to respondent sole discretion to promote to positions not covered by the CBA, such as crew leaders.

B. Proceedings Below.

On April 18, 1994, petitioner filed charges with the Equal Employment Opportunity Commission and the Texas Commission on Human Rights ("TCHR"), alleging that he had been denied both promotions and training opportunities because of his race and because he had previously filed a lawsuit against respondent charging race discrimination. While the agencies investigated these allegations, respondent continued to deny petitioner's request to attend classes held later that same year. Accordingly, after the TCHR issued a right to sue letter, petitioner filed suit on March 9, 1995, in the 215th Judicial District Court of Harris County, Texas, alleging that respondent had both discriminated against him on the basis of race, and retaliated against him for having filed his 1994 discrimination charge. Petitioner alleged both that this conduct violated the Texas Labor Code, §§ 21.001 *et seq.*, and that it was extreme and outrageous in violation of state common law. Petitioner deliberately confined his allegations to violations of state law, and pleaded no claim under Title VII of the Civil Rights Act, under the CBA or section 301 of the Labor Management Relations Act ("LMRA"), or under any other federal law.

Nevertheless, on April 6, 1995, respondent removed the case to the United States District Court for the Southern District of Texas, Houston Division. Respondent pointed out that the CBA spoke to the issue of promotions, and authorized it to take seniority and a variety of other matters into consideration. Thus, according to respondent, it would ultimately be necessary to consult the CBA in order to decide whether respondent had discriminated or retaliated against petitioner, and this need to consult the CBA, in turn, preempted petitioner's claim and replaced his state law claim

with a federal claim under section 301 of the LMRA, over which the federal courts had subject matter jurisdiction.

Petitioner moved to remand the case to state court, pointing out that defenses based on federal law do not ordinarily provide a basis for removal. Petitioner argued that, although the "complete preemption" doctrine makes section 301 preemption a partial exception to this general rule, under this Court's decision in *Lingle v. Norge*, 486 U.S. 399 (1988), a state law claim alleging retaliatory discharge is not ordinarily preempted by the LMRA because such claims typically do not require interpretation of a CBA; rather, the question in such cases is a factual one: was the employer's discharge decision motivated by forbidden animus, in which case the claim succeeds, or by some other reason, in which case it fails. Nevertheless, by a one-paragraph order, the district court ruled that petitioner's claims "require interpretation of the [CBA] and are therefore preempted by section 301 . . .." App. 6a.

Petitioner moved for reconsideration, arguing that there was no need to examine the CBA in order to determine whether his race and retaliation claims were valid. He acknowledged that, in a recent decision, *Medrano v. Excel Corp.*, 985 F.2d 230 (1993), the Fifth Circuit had held that a state law retaliatory discharge claim was preempted because it was predicated on an allegation that a provision in the CBA unlawfully authorized retaliation for filing a workers compensation claim. That case was distinguishable, he contended, because the CBA here did not purport to authorize racial discrimination in promotions. Moreover, he noted that courts in several other circuits had expressly held that state law claims of race or national origin discrimination are not preempted by the LMRA. Furthermore, he argued,

even if the court might have to **look** at the CBA in the course of deciding his case, that was not the same as having to interpret the CBA, not to speak of making the CBA so central to his claim as to cause it to be preempted.

The district court denied reconsideration of its finding of complete preemption. It stated that the CBA "governs" respondent's "exclusive, discretionary right to select, promote, demote, transfer or assign head cable splicers after consideration" of various factors, and that, consequently, even though the intentional infliction claim was based solely on racial discrimination, the element of extreme and outrageous conduct "implicates the[se] provisions of the CBA." *Id.* 9a. Accordingly, the Court stated, it would be necessary to interpret the CBA in order to decide petitioner's claim, and the claim was, therefore, preempted. Respondent then moved for summary judgment, and the district court, having already determined that the section 301 claim preempted the state law claim, dismissed petitioner's complaint as thus recharacterized because petitioner had not exhausted the grievance procedure under the CBA before filing his suit.

The court of appeals affirmed in a brief decision. It noted that, under Texas law, to establish his statutory discrimination claims petitioner would follow a burden-shifting scheme under which he could make out a prima facie case by showing his protected status, adverse treatment, and dissimilar treatment of non-protected employees; respondent would then articulate a legitimate non-discriminatory reason for its actions; and petitioner would then have the burden of showing that the articulated reason was pretext. App. 2a-3a. However, the court observed, Reece's claim of discrimination "turns on questions of promotion, seniority

and assignment to training programs, all of which are provided for in the CBA." *Id.* 3a. Because respondent would rely on the CBA to defend its conduct, the CBA would, the court assumed, inevitably have to be interpreted, and so this was a case where complete preemption resulted from the fact that "the interpretation of the CBA is made necessary by an employer defense." *Id.* (internal quotation marks and citation omitted).

Similarly, the court below concluded, petitioner's tortious discrimination claim required a showing of "extreme and outrageous conduct." The court opined, without any explanation, "[i]n order to evaluate whether [respondent]'s conduct was 'outrageous,' the conduct must be measured against the CBA." *Id.* The court below acknowledged that its decision conflicted with a line of cases in at least one other circuit. Thus, the Ninth Circuit had held in *Ramirez v. Fox Television Station*, 998 F.2d 743, 748 (1993), that no claims under California's employment discrimination statute were preempted. Nonetheless, the Fifth Circuit adhered to its position on the ground that it was "mandated" by *Lingle*. *Id.* 4a.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH SEVERAL DECISIONS OF THIS COURT AND OTHER STATE AND FEDERAL COURTS, AND PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW ABOUT WHETHER EMPLOYMENT DISCRIMINATION COMPLAINTS UNDER STATE LAW ARE AUTOMATICALLY PREEMPTED, AND HENCE REMOVABLE, WHEN THE EMPLOYER DEFENDS ON THE GROUND THAT IT COMPLIED WITH A COLLECTIVE BARGAINING AGREEMENT.

Review should be granted in this case for three reasons. First, the Fifth Circuit's analysis of section 301's preemptive scope is inconsistent with numerous decisions of this Court holding that independent state law claims are not preempted. Second, the decision below is squarely contrary to the holdings of several other lower courts, and indeed the lower courts continue to struggle to determine the extent to which they may consult a CBA in the course of adjudicating an employer's defenses without thereby preempting the employee's independent state law claim. Third, removal to federal court, on the ground that respondent's defenses to petitioner's state law claims would require consideration of the CBA and thus require preemption of petitioner's claims, is similarly contrary to decisions of this Court and of numerous other federal courts. In order to understand how far the lower court has strayed, it is necessary first to review this Court's rulings in the area.

1. This Court has held that all claims that seek to enforce a collective bargaining agreement arise under section 301 of the LMRA, even if the plaintiff purports to bring the claim under state law. *Avco Corp. v. Machinists*, 390 U.S.

557 (1968); *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962). In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), the Court ruled that an employee cannot avoid the preemptive effect of section 301 simply by using a tort label to describe a claim that, in effect, seeks to enforce duties created by a CBA.

But *Allis-Chalmers* also insisted that the mere fact that an employer has entered into a CBA governing its employees' terms and conditions of employment does not immunize the employer from claims seeking to enforce state law rights that are independent of any right established by contract. 471 U.S. at 212. Section 301 did not "give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored." *Id.* Nor must the state claim be completely unrelated to the CBA; it must only be "sufficiently independent of the [CBA] to withstand the pre-emptive force of § 301." *IBEW v. Hechler*, 481 U.S. 851, 859 (1987).

Lingle v. Norge, 486 U.S. 399 (1988), made clear the limits of the preemption doctrine enunciated in *Allis-Chalmers*, by holding that an employee's state law claim of retaliatory discharge is not preempted by the LMRA. *Accord Hawaiian Airlines v. Norris*, 114 S. Ct. 2239 (1994) (no preemption under Railway Labor Act ("RLA")). Some lower courts had understood *Allis-Chalmers* to stand for the proposition that any state law claim brought by a unionized employee was necessarily dependent on the CBA if there existed parallel rights in the CBA and a grievance procedure for enforcing them. In *Lingle*, the employee claimed that she

had been fired for exercising her right to file a workers compensation claim, and the Court held that the mere existence of a CBA with an arbitration clause was not sufficient to preclude the states from providing an independent cause of action to employees who were terminated for a reason deemed by the state to be contrary to public policy. The Court held that state law tort claims are preempted only to the extent that they are dependent on the meaning of a CBA, and the fact that a CBA may contain a clause that provides rights parallel to the state claim does not make the state law claim "dependent" on the CBA. 486 U.S. at 408-410. When the employee claims that the discharge was based on the exercise of the right to file a workers compensation claim, the Court ruled, there is no need to inquire into the meaning of the CBA, because either the employer proceeded with the alleged bad motive, in which case the employee prevails, or it did not, in which case the employee loses. The Court went on to observe that it was possible for a state law claim to require some reference to a CBA without being preempted:

> [A]s a general proposition, a state-law claim may depend for its resolution upon both the interpretation of a CBA and a separate state-law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the state law analysis would not thereby be preempted.
>
> 486 U.S. at 413 n.12.

Similarly, in *Hawaiian Airlines v. Norris*, 114 S. Ct. 2239 (1994), an aircraft mechanic claimed that he had been fired for refusing to certify the safety of certain planes and for reporting his safety concerns to the Federal Aviation Administration; the airline claimed that he had properly been

discharged for violating a provision of the CBA requiring mechanics to sign work records in connection with the work they perform, and that his claims and its defenses could only be pursued in arbitration under the RLA. This Court held that the state law claims were not preempted, specifically rejecting the employer's contention, based on *Conrail v. RLEA*, 491 U.S. 299 (1989), that a state law claim is preempted when the employer's action is "arguably justified" by a provision in the CBA. *Id.* at 2250. As the Court explained in *Norris*, the fact that a defense of arguable justification under the CBA may serve to distinguish between major and minor disputes under the RLA does not mean that the same test determines "the threshold question whether the dispute was subject to the RLA in the first place." *Id.* at 2251. And it would not be necessary to determine whether the employer violated the CBA in order to resolve state law retaliation claims, because those claims "require only the purely factual inquiry into any retaliatory motive of the employer." *Id.*

The same issue arose in *Livadas v. Bradshaw*, 114 S. Ct. 2068 (1994), where the employer contended that state law claims are necessarily preempted whenever an employer could identify some way in which a provision in the CBA could be relevant to the disposition of a state law claim. The Court acknowledged that there was substantial dispute among the lower courts about the application of the principles of *Lingle* and *Lueck*, and that there might be some cases where a genuine dispute could be implicated by state law claims even if the claims did not derive from the CBA. The Court found it unnecessary to decide whether it would be necessary to preempt such claims, on the one hand, or whether other means of accommodating the federal law interests could be

found short of complete preemption, *id.* at 2078 n.18, because in *Livadas* there was no dispute about the CBA's meaning. "[W]hen the meaning of contract terms is not the subject of dispute, the bare fact that a [CBA] will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." *Id.* at 2078.

Here, the employer did no more than point to a provision in the CBA that gave it broad discretion over the selection of persons to be promoted and over the allocation of training opportunities. There was no dispute about the meaning of these contract terms. And yet the court below allowed respondent's CBA-based defense to preempt petitioner's claim that the reason why he had been denied promotions and training was racial discrimination forbidden by state law. The conflict between the ruling of the Fifth Circuit and the consistently contrary decisions of the Court is the first reason why certiorari should be granted.

2. Second, as the court below readily acknowledged, its approach to preemption of discrimination claims squarely conflicts with other appellate decisions. Indeed, with respect to class-based discrimination claims, the Fifth Circuit stands virtually alone in its position that the mere need to examine a CBA causes the state law claim to be preempted. The Fifth Circuit so held in the case below, as it had previously done in *Medrano v. Excel Corp.*, 985 F.2d 230 (5th Cir. 1993).

Every other court to consider the question in the context of race or sex discrimination claims has found them to be indistinguishable from retaliation cases like *Lingle* and

Norris[1]. As the court below acknowledged, App. 4a, the Ninth Circuit takes a diametrically opposing position to the Fifth Circuit, refusing to preempt state law discrimination claims simply because the employer pointed to a CBA as a possible justification for its actions. *E.g., Ramirez v. Fox Television Station*, 998 F.2d 743, 749 (1993):

> The [CBA] may be crystal clear . . . but Fox nonetheless may have ignored the [CBA] or applied it to her in a discriminatory manner. Thus, reference to or consideration of the terms of a [CBA] is not the equivalent of interpreting the meaning of the terms. If it were, all discrimination actions brought by unionized employees would be preempted because the starting point for every case would have to be the agreement. Although the line between reference to and interpretation of an agreement may be somewhat hazy, merely referring to an agreement does not threaten the goal that prompted

---

[1] Some First Circuit cases suggest that that court may be closer to the Fifth Circuit in its hospitality to section 301 preemption claims. One enigmatic decision held that a state claim of discharge to prevent an employee from obtaining commissions was preempted because the CBA regulated the rates of pay, including commissions, *Quesnel v. Prudential Ins. Co.*, 66 F.3d 8 (1st Cir. 1995), and another held that state law handicap discrimination claims are preempted by section 301. *O'Brien v. Conrail*, 972 F.2d 1 (1992). The majority rule remains that handicap claims are not preempted. *E.g., Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514 (9th Cir. 1995); *Martin Marietta Corp. v. Maryland Comm. on Human Relations*, 38 F.3d 1392, 1398-1402 (4th Cir. 1994); *Smolarek v. Chrysler Corp.*, 879 F.2d 1326, 1334 (6th Cir. 1989); *Miller v. AT&T Network Systems*, 850 F.2d 543, 548-550 (9th Cir. 1988). *Compare Davis v. Johnson Controls*, 21 F.3d 866, 868 (1994) (preempted), *with Taggart v. TWA*, 40 F.3d 269, 274-275 (8th Cir. 1994) (not preempted).

> preemption — the desire for uniform interpretation of labor contract terms.

Accord Kohl's Food Stores v. Hyland, 32 F.3d 1075, 1079 (7th Cir. 1994) (CBA may be consulted along with other factors without interpreting its terms and thus preempting state claim). The Ninth Circuit has repeatedly denied employer attempts to use section 301 to preempt claims under a variety of state anti-discrimination laws.[2]

Numerous district courts in other circuits have reached the same conclusion.[3] The issue often arises, as it did here, in the context of a motion to remand a case that was removed on grounds of complete preemption. Because such rulings are nonappealable under 28 U.S.C. § 1447(c), they are the final word in those districts. Moreover, appellate courts in several states have refused to preempt state discrimination claims simply because the employer claimed that the CBA supported its position.[4] And several other courts of appeals,

---

[2] *E.g.*, *Cook v. Lindsay Olive Growers*, 911 F.2d 233, 240 (9th Cir. 1990) (religious discrimination claim not preempted); *Jackson v. Southern California Gas Co.*, 881 F.2d 638, 644 (9th Cir. 1989) (race discrimination claim not preempted).

[3] *E.g.*, *Knox v. Wheeling-Pittsburgh Steel Corp.*, 899 F. Supp. 1529, 1534-1535 (N.D.W.Va. 1995) (state-law claim of sex discrimination and sexual harassment not preempted); *Carrington v. RCA Global Communications*, 762 F. Supp. 632, 639-642 (D.N.J. 1991).

[4] *E.g.*, *Commodore v. University Mech. Contr.*, 120 Wash.2d 120, 132-133, 839 P.2d 314, 320 (1992). *See also Hatridge v. Day & Zimmerman*, 789 S.W.2d 654 (Tex. App. -- Texarkana 1990) (race discrimination claim not preempted; no mention of defense based on CBA).

although not being presented with race or sex discrimination claims, have stated that such claims would not be preempted, because they present the factual question of motivation, not the legal question of the meaning of the CBA.[5]

There is a good reason why most lower courts have refused to allow preemption in cases like this one: if the employer's CBA-based defenses are sufficient to preempt the discrimination claim here, they will **always** lead to preemption of both discrimination and retaliation cases, thus completely undercutting the anti-preemption holdings of *Lingle, Norris,* and *Livadas*, and contrary to the presumption giving the narrowest scope to any preemption of state law. *See Medtronic, Inc. v. Lohr*, No. 95-754, at 12-13 (June 26, 1996). This case thus presents the question whether an employer's mere invocation of the CBA as presenting a potential defense can serve to destroy a cause of action that a state has chosen to promulgate to protect its citizens.

In this case, petitioner claims that his employer withheld certain valuable job benefits from him because of his race, pointing to evidence that these benefits were routinely given to white employees and not to black employees similarly situated. The employer responded, as employers generally do, by contending that it had other, legitimate reasons for according the benefits to others but not petitioner. Whenever an employer has a CBA, the employer will, of course, contend — as respondent did here — that the CBA recognizes the legitimacy of the reasons it has given for

---

[5] *O'Brien v. Conrail*, 972 F.2d 1, 5-6 (1st Cir. 1992); *McCall v. Chesapeake & Ohio Ry. Co.*, 844 F.2d 294, 302 (6th Cir. 1988); *Lingle v. Norge*, 823 F.2d 1031, 1046 n.17 (7th Cir. 1987), *rev'd on other grounds*, 486 U.S. 399 (1988).

its benefit distribution decisions. Under the decision below, the mere fact that the employer has **asserted** justifications based on the CBA is sufficient first to warrant removal to federal court, wresting the decisional power from the state's own courts, and then to extinguish the state's anti-discrimination policy, leaving the matter solely to the disposition of the union and the employer through the grievance procedure. Such a result is completely inconsistent with this Court's holdings in *Lingle* and its progeny. "It is, to say the least, difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Medtronic, Inc. v. Lohr*, No. 95-754, at 15 (June 26, 1996) (plurality opinion).

The fact that petitioner has alleged his racial discrimination claim in the form of the tort of intentional infliction of emotional distress ("IIED") in addition to his claim under the Texas civil rights statute does not require the preemption of the tort claim. The lower courts are divided over the question whether IIED claims are preempted by section 301, with a single circuit often displaying a startling inconsistency of analysis. Not infrequently, a court will simply conclude that, because liability for IIED depends on a finding that the employer's behavior was outrageous and extreme, the entire circumstances of the workplace must be examined, including the rights and obligations set forth in the CBA, thus requiring that the state claim be preempted. *E.g.*, *McCormick v. AT&T Technologies*, 934 F.2d 531 (4th Cir. 1993) (*en banc*). Such courts treat IIED claims as the working conditions equivalent of the bad faith denial of insurance benefits that this Court found preempted in *Allis-Chalmers*; they can, therefore, reach a conclusion of preemption, as the court below did, without a careful

consideration of the specifics of the claim or of the factual context.[6] Other courts have been willing to give more detailed treatment to the question of preemption, and find no preemption when they decide that the employer's alleged conduct was so outrageous, or concerned matters so extraneous to the specific CBA involved in the case, that nothing in the CBA could possibly justify the conduct if the allegations in the complaint are proved.[7]

---

[6] *E.g., Mock v. T.G.&Y. Stores*, 971 F.2d 522, 530 (10th Cir. 1992), *quoting Johnson v. Beatrice Foods Co.*, 921 F.2d 1015, 1020-1021 (10th Cir. 1990). Paradoxically, the Ninth Circuit, which sometimes gives case-specific consideration to the ability of IIED claims to survive preemption, *e.g., Galvez v. Kuhn*, 933 F.2d 773, 779-780 (9th Cir. 1991), summarily determined in *Miller v. AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988), that an IIED claim that was litigated along with a non-preempted handicap discrimination claim, *id.* at 548-550, was nevertheless preempted because the outrageousness of the IIED claim **could** (but might not) depend on whether the behavior violated the CBA. *Id.* at 550-551. *See also Jackson v. Southern California Gas Co.*, 881 F.2d 638, 645-646 (9th Cir. 1989) (dismissing as preempted an IIED claim based on the same conduct as a race discrimination claim that was not preempted).

[7] *E.g., Lightning v. Roadway Express*, 60 F.3d 1551 (11th Cir. 1995) (intense verbal abuse); *Jackson v. Kimel*, 992 F.2d 1318 (4th Cir. 1993) (alleged sexual harassment); *Milne Employee's Ass'n v. Sun Carriers*, 960 F.2d 1401, 1412-1413 (9th Cir. 1991) (IIED claim based on unfair termination preempted, IIED claim based on false representations of job security not preempted); *Hanks v. General Motors*, 906 F.2d 341 (8th Cir. 1990) (worker required to work with foreman indicted for molesting her daughter); *Keehr v. Consolidated Freightways*, 825 F.2d 133, 137-138 (7th Cir. 1987) (worker alleged abusive and insulting language); *Rasheed v. International Paper Co.*, 826 F. Supp.

(continued...)

As may be seen from the cases cited in the footnotes, a finding of no preemption is particularly likely where the tort is, as here, predicated on mistreatment based on race or gender. Indeed, in *Hirras v. National RR Passenger Corp.*, 48 F.3d 278, 283-284 (5th Cir. 1995), the Fifth Circuit itself, on remand from this Court based on *Norris*, refused to preempt an IIED claim based on sexual harassment. The court below did not even mention *Hirras*, not to speak of explaining why the CBA was irrelevant in that case but central to this one.

We wish to emphasize that our point here is not that the preemption question was necessarily decided wrongly in any of the cases cited from other circuits. Rather, the reason why these cases are all over the map — and why, in our judgment, employment law practitioners and employers alike find it very difficult to predict how the preemption issue will be resolved — is that the lower courts do not understand just how far *Lingle*'s non-preemption standard allows them to go in looking at a CBA where the claim is based on substantive state law.

This Court has, over the past few years, considered and rejected numerous petitions for certiorari from both sides in cases raising questions about how the *Lingle* standard should

---

[7](...continued)
1377, 1386 (S.D. Ala. 1993) (racial discrimination). *See also Commodore v. University Mech. Contr.*, 120 Wash.2d 120, 135-137, 839 P.2d 314, 321-322 (1992) (racial discrimination); *Pikop v. Burlington Northern R. Co.*, 390 N.W.2d 743, 748-753 (Minn. 1986) (sexual harassment and national origin discrimination). *Cf. Nash v. AT&T Nassau Metals*, 381 S.E.2d 206, 209 (S.C. 1989) (case by case evaluation of preemption required; claim at issue preempted because claim is abuse of contractual privileges).

be applied. In *Norris* and *Livadas*, the Court extended the *Lingle* standard to cases involving the railroad and airline industries and to cases involving wage claims. The question with which lower courts continue to grapple, however, is what the *Lingle* standard means in practice — does an otherwise non-preempted case become preempted as soon as the employer raises a CBA-related defense to the state law claim? The widespread disagreement shows that the lower courts are struggling to apply the preemption rules established by this Court in *Allis-Chalmers* and *Lingle*. *See Galvez v. Kuhn*, 933 F.2d 773, 776 (9th Cir. 1991); Note, *The Need for a New Approach to Federal Preemption of Union Members' State Claims*, 99 Yale L.J. 209, 209 (1989).

Both the lower courts and thousands of litigants need the Court's guidance on this question, and this case presents the question very cleanly in the context of race discrimination claims, whether presented as a statutory civil rights action or as a tort claim of outrageous conduct. Moreover, the context here shows that the decision below threatens to completely eviscerate the *Lingle* standard. The Court should therefore grant certiorari to resolve the conflict among the circuits over the extent to which a CBA may be considered in a *Lingle*-type case.

3. There is another reason why review by this Court will be of great significance to the lower courts. Under the analysis of the Fifth Circuit, the mere invocation of a CBA entitles the employer to remove every state-law-based employee claim to federal court, thereby substantially increasing the workload of the federal courts and requiring all CBA-based preemption claims to be decided there. This approach is squarely contrary to this Court's opinion concerning removal of cases based on alleged preemption by

concerning removal of cases based on alleged preemption by section 301 in *Caterpillar v. Williams*, 482 U.S. 386 (1987), and to this Court's analysis of *Caterpillar* in *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989).

In *Caterpillar*, employees sued under state law to enforce contracts which, they alleged, were formed by Caterpillar's promises, made to them individually, that they would not be laid off if the plant were closed. Although this Court affirmed the holding that the case was improperly removed, it unanimously rejected the Ninth Circuit's reasoning. *Id.* at 391 n.4. The Court ruled that, even though a court must determine whether a plaintiff's complaint, properly pleaded, is based on federal or state law, the plaintiff may opt to avoid federal jurisdiction by exclusive reliance on state law. *Id.* at 392. Even the doctrine of complete preemption does not rob a plaintiff of this right, so long as the state law claim is not substantially dependent on a CBA. Thus, the *Caterpillar* plaintiffs asserted a breach of **individual** employment contracts, and even if they could also have asserted claims under the CBA, as masters of their complaint, they were free not to do so. *Id.* at 395. Because the complaint did not rely on a CBA, or even address the relationship between the individual contracts and the CBA, the claims did not arise under section 301, and the case was not removable based on the doctrine of complete preemption. *Id.* Even though Caterpillar was also arguing for preemption on the theory that the state law contract could not be enforced within the bargaining unit because of NLRA law, and the contract had to be construed in deciding the validity of that argument, that was still not enough to warrant removal:

> [T]he presence of a federal question, even a § 301 question, in a defensive argument does not

> overcome the paramount policies embodied in the well-pleaded complaint rule . . . [A] *defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated.
>
> 482 U.S. at 398-399 (emphasis in original).

This analysis was reaffirmed when the Court explained the significance of *Caterpillar* in *Oklahoma Tax Commission*, another removal case, although one not involving a CBA:

> In *Caterpillar*, we ruled that application of the well-pleaded complaint rule defeated federal-question jurisdiction, and therefore removability, in a case in which the employees sued on personal state employment contracts. We refused to characterize these state-law claims as arising under federal law **even though an interpretation of the collective-bargaining agreement might ultimately provide the employer a complete defense to the individual claims, and even though employee claims on the collective-bargaining agreement would have been the subject of original federal jurisdiction.**
> 489 U.S. at 841 (emphasis added).

Even before *Oklahoma Tax Commission,* the Tenth Circuit had followed *Caterpillar* by barring removal of state law claims based on the contention that they were waived in a CBA.[8] The Sixth and Eighth Circuits have also held that

---

[8] *Plumbers Local 57 v. Bechtel Power Corp.*, 834 F.2d 884, 889-890 (10th Cir. 1987).

the mere fact that, in addressing a defense based on an interpretation of a CBA, the state court might ultimately hold that a plaintiff's claim is preempted, does not warrant removal of that claim to federal court.[9] District court decisions in other circuits have reached that conclusion as well.[10] The Ninth Circuit, by contrast, has held that neither *Caterpillar* nor *Oklahoma Tax Commission* bars removal based on the invocation of the CBA as a defense to state law employment claims.[11]

Because of the view of many courts that a case is removable to federal court whenever section 301 may preempt all or part of state law claims, a most undesirable litigation dynamic is produced. Employers that have CBAs have every incentive to remove to federal court on grounds of section 301 preemption. They know that if they succeed in removing the case, the necessary result is that the entire case is preempted, and thus that they can defeat the state law

---

[9] *Humphrey v. Sequentia*, 58 F.3d 1238, 1244 (8th Cir. 1995); *Tisdale v. Plumbers Local 704*, 25 F.3d 1308, 1313-1314 (1994); *Welch v. General Motors Corp.*, 922 F.2d 287, 291-292 (6th Cir. 1990); *Smolarek v. Chrysler Corp.*, 879 F.2d 1326, 1333-1334 and n.3 (6th Cir. 1989) (*en banc*) (case remanded even though interpretation of CBA might show absence of discriminatory animus).

[10] *E.g., Miller v. Fairchild Industries*, 668 F. Supp. 461, 467 (D. Md. 1987) (defendant claimed that supplemental CBA released all claims in connection with plant closing); *Machinists Local 967 v. General Elec. Co.*, 713 F. Supp. 547, 554-555 (N.D.N.Y. 1989); *Glass Molders v. Wickes Cos.*, 707 F. Supp. 174, 178 (D.N.J. 1989).

[11] *Stikes v. Chevron USA*, 914 F.2d 1265, 1268-1269 (9th Cir. 1990).

claim, without even having to get into the details of the case and show that the CBA, as they contend it should be construed, actually does provide a defense to the claim. Frequently, too, the employee-plaintiff's lawyer is a state court practitioner who rarely appears in federal court, thus adding to the employer's litigation advantage. And even if the case is remanded, it will be with the proviso that the state courts remain free to decide the preemption defense in the employer's favor. Removal is thus a no-lose proposition, and the result is that many more cases are imposed on the federal dockets (and an employee-plaintiff's litigation burdens become all the greater) than there ought to be. The Court should therefore grant certiorari in order to curtail this growing imposition on the federal courts, and to resolve the growing conflict among the lower courts about whether removal is proper.[12]

---

[12] We note that, in the lower courts, this case was litigated on the assumption that the questions of preemption by section 301, and federal jurisdiction warranting removal to federal court, were one and the same. On this theory, all cases in which section 301 preempts state law are removable, and hence the only significant question is whether there is, in fact, preemption. Petitioner did not specifically discuss whether preemption through defensive use of the CBA raises different issues of federal jurisdiction than does the issue of whether there is preemption of a claim based on the well-pleaded elements of the plaintiff's case.

However, because this issue goes to the question of subject matter jurisdiction it may be raised at any time, and petitioner is obligated to note the problem once found by his new Supreme Court counsel. Moreover, as argued in the text, the basic misconception on the issue of jurisdiction that was shared by the parties and the courts below is widespread, and it has forced the federal courts to take jurisdiction of numerous cases in which the

(continued...)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL ALAN LEVY
(Counsel of Record)
ALAN B. MORRISON

Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

MICHAEL SCOTT THOMAS

Suite 180
2646 South Loop West
Houston, Texas 77054
(713) 665-8558

Attorneys for Petitioner

July 9, 1996

---

[12](...continued)
preemption question should be resolved in the state courts if there is an actual need to examine the CBA in litigation of the claims and defenses that are being raised.

APPENDIX

Raymond REECE, Plaintiff-Appellant,
v.
HOUSTON LIGHTING & POWER COMPANY,
Defendant-Appellee

No. 95-20646

United States Court of Appeals,
Fifth Circuit

April 10, 1996.

Michael S. Thomas, Thomas & Williams, Houston, TX, for plaintiff-appellant.

L. Chapman Smith, Matthew Paul Eastus, Baker and Botts, Houston, TX, for defendant-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before BARKSDALE, DeMOSS and PARKER, Circuit Judge.

ROBERT M. PARKER, Circuit Judge:

I. FACTS AND PROCEEDINGS BELOW

Reece is an employee of HL & P, subject to a collective bargaining agreement (CBA) which contains a mandatory grievance and arbitration procedure. Reece filed suit against HL & P in state court, alleging that, on the basis of his race, he was (1) denied promotions and training; (2) retaliated against for engaging in a protected activity; and (3) subjected to intentional infliction of emotional distress. Reece never filed a grievance under the CBA, and the time for doing so has run.

HL & P answered and removed the case to federal court. The district court denied Reece's motion to remand, concluding that § 301 of the Labor Management Relations Act (LMRA) preempted Reece's causes of action. *See* 29 U.S.C. § 141, *et seq.* The district court then granted HL & P's motion for summary judgement, finding that Reece's claims were barred because of his failure to exhaust his mandatory administrative remedies under the CBA.

Reece appeals only the remand issue.

II. ANALYSIS

At issue is whether the district court properly concluded that § 301 of the LMRA preempted Reece's claims. Preemption is a question of law reviewed de novo. *Baker v. Farmers Elec. Coop., Inc.*, 34 F.3d 274, 278 (5th Cir. 1994). If the resolution of Reece's claims will require "interpretation" of the CBA, then the state-law remedies upon which Reece relies are preempted by § 301 of the LMRA. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988). Thus, the dispute is whether the CBA must be interpreted in resolving Reece's clams.

A. *Discrimination Claim:*

To establish a *prima facie* case of discrimination under the Texas Labor Code, Reece would have to prove that he (1) was a member of a protected class; (2) suffered an adverse employment action; and (3) was treated dissimilarly from non-protected employees. *Farrington v. Sysco Food Serv., Inc.*, 865 S.W.2d 247, 251 (Tex.App.-Houston [1st Dist.] 1993, writ denied). If Reece were to establish a *prima facie* case, HL & P would then have the burden of articulating a legitimate, non-discriminatory reason for the allegedly unequal treatment. *Id.* Then the burden would shift

back to Reece to prove that the articulated reason was a pretext for unlawful discrimination. *Id.*

Reece's discrimination claim turns on questions of promotion, seniority, and assignment to training programs, all of which are provided for in the CBA. HL & P will undoubtedly rely on the CBA as its legitimate, non-discriminatory reason for Reece's treatment. When Reece then attempts to show that HL & P's stated reason is pretextual, the CBA would have to be interpreted because Reece would have to challenge HL & P's rights under the CBA. Thus, the interpretation of the CBA "is made necessary by an employer defense." Rebecca Hanner White, *Preemption of State Law Claims: A Model for Analysis*, 41 Ala.L.Rev. 377, 427 (1989).

B. *Intentional Infliction of Emotional Distress Claim:*

For Reece to sustain his claim of intentional infliction of emotional distress under Texas law, he must prove (1) HL & P acted intentionally or recklessly; (2) HL & P's conduct was extreme and outrageous; (3) such conduct caused emotional distress; and (4) such distress was severe. *Baker*, 34 F.3d at 280. In order to evaluate whether HL & P's conduct was "outrageous," the conduct must be measured against the CBA.

Thus, the resolution of Reece's claim will require interpretation of the CBA. Therefore, the claims are pre-empted by § 301 of the LMRA.

We acknowledge that the Ninth Circuit has taken a much more lenient view of preemption of state law discrimination claims. *See, e.g., Ramirez v. Fox Television Station, Inc.*, 998 F.2d 743, 748 (9th Cir. 1993) ("In every case in which we have considered an action brought under the California Employment Act, we have held that it is not preempted by section 301.") (collecting cases). Nevertheless, we find that *Lingle* mandates our analysis.

This result is strengthened by the policies behind preemption in this context. The Supreme Court has recognized the unique need for uniformity in the interpretation of labor contracts:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. . . . The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of the federal labor policy.

Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 103-04, 82 S.Ct. 571, 577, 7 L.Ed.2d 593 (1962) (citations omitted).

Reece argues that the right to be free of discrimination is a non-negotiable state-law right that cannot be altered or waived by agreement. Nevertheless, *Lingle* forecloses such an argument: "It is conceivable that a State could create a remedy that, although nonnegotiable, nonetheless turned on an interpretation of a collective-bargaining agreement for its application. Such a remedy would be pre-empted by § 301." *Lingle*, 486 U.S. at 407 n. 7, 108 S.Ct. at 1882 n. 7. The

situation described by the *Lingle* Court is the situation presented in this case.

The district court's denial of the motion to remand is therefore AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
MAY 02 1995
Michael N. Milby Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SQUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RAYMOND REECE, Plaintiff VS. HOUSTON LIGHTING AND POWER COMPANY, Defendant	CIVIL ACTION NO. H-95-1025

ORDER

Pending before the Court in the above referenced action alleging denial of promotion and work assignments in violation of state law is Plaintiff Raymond Reece's motion for remand (instrument #4). Because this Court agrees that Plaintiff's claims require interpretation of the collective bargaining agreement and are therefore preempted by section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), the Court

ORDERS that the motion is DENIED.

SIGNED at Houston, Texas on this 30th day of April, 1995.

Melinda Harmon /sig/
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
JUL 25 1995
Michael N. Milby Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RAYMOND REECE, Plaintiff VS. HOUSTON LIGHTING AND POWER COMPANY, Defendant	CIVIL ACTION NO. H-95-1025

ORDER

Pending before the Court in the above referenced action alleging employment discrimination in promotion and training based on race are, *inter alia*, Plaintiff Raymond Reece's motion to amend interlocutory order (instrument #7), Plaintiff's motion for reconsideration of the Court's denial of his motion for remand (#8), Plaintiff's request for oral hearing on his motion for reconsideration (#9), and Plaintiff's unopposed motion to stay ruling on Defendant Houston Lighting and Power's motion for summary judgment pending resolution of Plaintiff's motion for reconsideration (#17). This action was removed on the basis of complete preemption under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 185 *et seq.*, because Plaintiff is a bargaining unit employee and his claims require interpretation of the collective bargaining

agreement ("CBA"). The Court denied Plaintiff's motion to remand for the same reason on April 30, 1995.

Plaintiff requests amendment of the Court's order denying remand so that it can be immediately appealed. Because the matter is one of established law in this Circuit and because this Court finds no good reason for piecemeal litigation and delay in the instant suit, it denies the motion to amend its order.

Plaintiff moves the Court to reconsider its order denying remand because he asserts that his state-law claims for intentional infliction of emotional distress and race discrimination do not require interpretation of provisions of the CBA.

After reviewing the record and the applicable law, this Court has not changed its mind that removal was proper because of complete preemption by the LMRA. Plaintiff complains that Defendant's refusal to promote him to foreman or to assign him to certain training classes alone caused him emotional distress. Article XV, § 6 of the CBA governs Defendant's exclusive, discretionary right to select, promote, demote, transfer or assign head cable splicers after consideration by Defendant of "ability, skill, qualifications, performance, seniority, attendance and conduct," and with a right to file a grievance reserved to Plaintiff. To sustain a claim for emotional distress in Texas, a plaintiff must prove that (1) the defendant acted intentionally or recklessly, (2) that the defendant's conduct was extreme and outrageous, (3) that defendant's conduct caused the plaintiff's emotional distress, and (4) that the emotional distress was severe. *Tidelands Automobile Club v. Walters*, 699 S.W.2d 939, 942 (Tex. App.--Beaumont 1985, writ ref'd n.r.e.). Thus as the alleged sole cause of his emotional distress, Defendant's refusal to promote Plaintiff or assign his [sic] to requested training must be extreme or outrageous to prevail on his claim. Because the emotional distress claim is unavoidably and inextricably intertwined with Defendant's conduct in failing to promote or assign Reece where Reece desired, the

essential element of extreme and outrageous conduct to establish intentional infliction of emotional distress implicates the provisions of the CBA that give Defendant the right to promote and to assign training. Thus the state law claim is preempted. *Baker v. Farmers Elec. Coop.*, 34 F.3d 274 (5th Cir. 1994); *see also Hirras v. National R.R. Passenger Corp.*, 44 F.3d 278, 283 (5th Cir.1995) ("[I]f a CBA [can] be interpreted to give an employer the right to engage in conduct that is the subject of an emotional distress claim, an interpretation of the right granted by the CBA is necessary to the resolution of that claim," *citing Baker*, 34 F.3d at 280). Because Plaintiff's claim involves questions of promotability, seniority, and work assignments, it is inextricably intertwined with terms of the CBA that give Defendant the exclusive discretionary right to determine which employees will be promoted or trained. *Medrano v. Excel Corp.*, 985 F.2d 230, 233 (5th Cir.), *cert. denied*, 114 S. Ct. 79 (1993).

For these reasons the Court

ORDERS that Plaintiff's motion to amend interlocutory order and motion for reconsideration are DENIED. The Court further

ORDERS that Plaintiff's request for oral hearing and motion to stay ruling are MOOT.

SIGNED at Houston, Texas, this 24th day of July, 1995.

Melinda Harmon /sig/
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
AUG 10 1995
Michael N. Milby Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RAYMOND REECE, Plaintiff VS. HOUSTON LIGHTING AND POWER COMPANY, Defendant	CIVIL ACTION NO. H-95-1025

MEMORANDUM AND ORDER

Pending before the Court in the above referenced action alleging employment discrimination in promotion and training based on race is Defendant Houston Lighting & Power Company's motion for summary judgment for failure to exhaust administrative remedies (instrument #15).

This Court has previously held that the claims of Plaintiff Raymond Reece, employed by Defendant as a head cable splicer and subject to a collective bargaining agreement ("CBA"), are preempted by the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a) (1988). The CBA includes a mandatory grievance and arbitration procedure as the exclusive remedy for violations of the CBA[1]. Moreover the CBA requires that a grievance

[1] CBA, Art. XVI, §§ 1-2, 4.

must be filed within five days, and that any grievance not filed within the proscribed period "shall be conclusively deemed to have been waived." CBA, Art. XVI § 3. "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by the employer and union as a mode of redress [emphasis added]." *Republic Steel Corp v. Maddox*, 379 U.S. 650, 652 (1965). *See also Thomas v. LTV Corp.*, 39 F.3d 611, 621 (5th Cir. 1994)("[I]f the arbitration-and-grievance proceeding is the exclusive remedy for breach of the CBA, the employee may not sue his employer under section 301 until completion of the proceeding"); *Strachan v. Union Oil Co.*, 768 F.2d 703, 704 (5th Cir. 1985)("The law is completely clear that employees may not resort to state tort or contract claims in substitution for their rights under the grievance procedure in a collective bargaining agreement."); *Ross v. Runyon*, 858 F. Supp. 630, 634 (S.D. Tex. 1994) ("Before bringing suit, the employee must at least attempt to exhaust the grievance and arbitration procedures established by the bargaining agreement.") Defendant argues that Reece's failure to file a timely grievance and to exhaust these exclusive remedies under the CBA, which constitutes a violation of the CBA,[2] waives his right to pursue his claims and requires that summary judgment be granted to Defendant and that these now untimely claims be dismissed with prejudice. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563 (1976)("unless [the bargaining unit employee] attempted to utilize contractual procedures for settling his dispute with his employer, his independent suit against the employer in District Court would be dismissed"); *Parham v. Carrier Corp.*, 9 F.3d 383, 392 (5th Cir. 1993) ("we render a take-nothing judgement against Parham on his breach of

---

[2] 2 CBA, Art. XVI, §§ 1-4.

collective bargaining agreement claims, for failure to invoke the grievance procedures required under the CBAs"); *Strachan*, 768 F.2d at 706-07 (affirming summary judgement for employer where state tort claims were preempted by federal law and employees failed to exhaust grievance procedures).

Conceding that if the LMRA preempts his claims because they require interpretation of the CBA, then he was required to exhaust grievance procedures established by the CBA, Plaintiff responds that pursuant to a continuing violation theory of discrimination, he has exhausted the exclusive grievance and arbitration procedures established by the collective bargaining agreement. On March 12, 1990, he filed a Charge of Discrimination (No. 330 90 1276) alleging that he was subjected to difference terms and conditions of employment because of his race. He also filed a grievance against Defendant for violations of the CBA, Article XV § 6, which was found by the Arbitrator to lack merit. He provides copies of both. Plaintiff then filed a lawsuit, *Raymond L. Reece v. Houston Lighting and Power Co.*, 234th Judicial District Court, Harris County, Texas, which was resolved by a settlement agreement and a final release on January 5, 1993. Plaintiff filed another Charge of Discrimination on April 18, 1994, alleging that since January 4, 1993, he had been retaliated against for having filed a lawsuit based on a previous charge of discrimination and had been denied training and promotions because of his race. He points out various instances of racial discrimination in training and promotions against blacks at HL&P.

Plaintiff notes that to establish a continuing violation he must show that the violation was part of a continuously maintained illegal employment practice. *Ross*, 858 F. Supp. at 637; *Perez v. Laredo Junior College*, 706 F.2d. 731, 734 (5th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984). He has shown the history of his charges and the application of an illegal policy toward him and others of his race. Moreover

since the settlement of his first lawsuit in January 1993, he has been passed over eight times for a promotion to crew leader/foreman positions for which he was qualified and which were assigned to white males, and he was demoted for a longer time for falsifying company documents and misuse of company assets than was a white male who tested positive of [sic] drug use. He notes that the settlement agreement required Defendant to expunge his personnel file of the Firm and Final Warning issued to him February 5, 1990, but no expungement took place. He therefore insists that fact issues exist as to whether Plaintiff exhausted his remedies under the CBA under a continuing violation theory.

Alternatively he argues that an employee does not have to exhaust available grievance procedures if exhaustion of those remedies would be futile. *Parham*, 9 F.3d at 390-91; *Rabelais v. Dresser Indus., Inc.*, 566 F.2d 518, 519 (5th Cir. 1978). An employee has the burden of producing some evidence that use of the grievance procedure would be futile. *Parham*, 9 F.3d at 391. Accordingly Plaintiff points out that his grievance and first Charge of Discrimination were based on the CBA, Article XV, § 6, and that Defendant has asserted that the same provision governs Plaintiff's allegations here. Moreover he presents a portion of a letter dated July 25, 1990 from the Union's[3] legal counsel in reference to that part of the CBA:

> Moreover, we have, in the past arbitrated this issue, an issue indistinguishable from your client's grievance, and have done so without success. In other words not only does that

---

[3] The International Brotherhood of Electrical Workers

> contract language[4] appear fairly clear, but an Arbitrator has interpreted that language so as to render your client's grievance without merit.

After reviewing the record, the Court finds that Plaintiff has not pleaded a continuing violation in his original petition, which has not been superseded. Instead his original petition references the Charge of Discrimination that he filed with the Equal Employment Opportunity Commission and the Texas Commission on Human Rights on April 18, 1994, Charge No. 330942039, attached as exhibit A, and the subsequent Notice of Right to Sue letter. That charge focuses on an April 18, 1994 denial of promotion to foreman because of his race and in retaliation for filing the lawsuit. The petition further alleges ongoing failure to train on July 25, 1994 in retaliation for filing the April 18, 1994 charge. As its third and final allegation, the petition asserts that on August 9-11, 1994 Plaintiff was denied the opportunity to attend a "Troubleshooting Class" because of race and retaliation.

The Court notes that a plaintiff cannot use a continuing violation theory "to resurrect claims about discrimination concluded in the past . . . ." *McGregor v. Louisiana State University Bd. of Supervisors*, 3 F.3d 850, 867 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1103 (1994). Plaintiff's earlier claims were administratively exhausted, then settled during a lawsuit with a full and final release executed. Second, there is no mention in the petition of the previous charges on which he sought to exhaust the grievance

---

[4] The Court notes that this letter refers to grievance filed by Plaintiff limited to his demotion from the status of "Head" Journeyman, to that of simply Journeyman.

The language referred to is the CBA's Article XV, § 6, "selection, promotion, demotion, transfer and/or assignment of Head Journeymen and Head Operators . . [are] within the sole discretion of the Company."

procedure under the CBA. Moreover retaliation is a distinct basis for alleging discriminatory conduct one never presented to the Arbitrator. Thus the Court rejects Plaintiff's continuing violation theory, apparently raised for the first time in response to Defendant's motion for summary judgment, as a means to circumvent the exhaustion requirement.

Nor does Plaintiff, who made no effort to exhaust his intraunion remedies,[5] make sufficient showing of futility to excuse his failure to attempt to use the grievance and arbitration procedure this time. Plaintiff makes no showing that the union officials who would hear his grievance were so hostile that he could not hope to obtain a fair hearing on his claims or that the grievance procedures would be inadequate or that they would unreasonably delay his opportunity to obtain judicial review. While the letter sent by the union counsel did not encourage Plaintiff to expect a good result, he was limited to his challenge to his demotion from the Head Journeyman position and constituted a realistic assessment of that narrow issue in light of the clear and unambiguous language of the CBA giving the Company complete discretion. By itself, without any effort on Plaintiff's side to attempt to use the exclusive grievance and arbitration remedies for his new and largely different claims, the letter cannot excuse Plaintiff from mandatory exhaustion requirements. Otherwise anyone with an unlikely chance of success could argue futility. Noting that "Congress has expressly approved contract grievance procedures as a preferred method for settling disputes . . .," and that the courts have held that an employee must have at least attempted to use them before initiating a lawsuit, the Fifth Circuit has stated, "The futility exception requires exactly that--futility. Before a plaintiff may safely

---

[5] It is clear from Plaintiff's earlier grievance that he was fully aware of the need to exhaust remedies under the CBA.

disdain available grievance procedures, invoking those procedures must truly be futile: not annoying, bureaucratic, or *unpromising*, but futile. An employee has the burden of producing some evidence that resort to available grievance procedures would *in fact* be futile: his mere subjective belief or conclusory assertion would not suffice." *Parham*, 9 F.3d at 391 (emphasis added).

Accordingly, the Court

ORDERS that Defendant's motion for summary judgment is GRANTED and that Plaintiff's claims are DISMISSED with prejudice for failure to exhaust administrative remedies.

SIGNED at Houston, Texas, this 8th day of August, 1995.

Melinda Harmon /sig/
MELINDA HARMON
UNITED STATES DISTRICT JUDGE